Office Supreme Court, U.S.
FILED
OCT 29 1962
JOHN F. DAVIS, CLERK

No. 479

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC. and ROCKY MOUNTAIN MOTOR TARIFF BUREAU, INC.,

Appellants

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *et al.*,

Appellees

On Appeal from the United States District Court for the District of Columbia

MOTION OF APPELLEE FREIGHT FORWARDERS TO AFFIRM

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Pursuant to Rule 16 of the Rules of this Court, the appellee freight forwarders (including the forwarder whose reduction in rates has been approved herein by the Interstate Commerce Commission and by the District Court) move that the unanimous judgment of the three-judge District Court sought to be reviewed in this case be affirmed on the ground that the questions on which the decision depends are so unsubstantial as not to need further argument.

In the proceeding before the Interstate Commerce Commission, the freight forwarder whose tariffs are directly involved (Western Freight Association) was the respondent. The other appellee forwarders* intervened in support

*Acme Fast Freight, Inc., International Forwarding Company, Inc., Merchants Shippers Association, National Carloading Corporation, Pacific Forwarding Association, Inc., Republic Carloading & Distributing Co., Inc. Universal Carloading & Distributing Co. Inc., Western Carloading Co., Inc. and Westland Forwarding Co.

of the respondent and all intervened in the District Court proceeding, in defense of the Commission's decision.

The opinion of the District Court is reproduced in the Appendix to the Jurisdictional Statement (herein called "J.S.") at pages 1a to 10a. The Report of the Commission and its Report on Reconsideration are reproduced in that Appendix at pages 10a to 15a and 19a to 24a.

STATEMENT IN SUPPORT OF MOTION

By tariff Schedules filed with the Commission in 1958, Western Freight Association (WFA), a freight forwarder under Part IV of the Interstate Commerce Act (49 U.S.C. Sec. 1000 *et seq.*), reduced its freight rates on certain westbound transcontinental shipments. The reductions, after approval by the Commission, became effective in May of 1959 (J. S. Appendix, p. 20a). The appellants seek to compel WFA to cancel its tariffs for the rate reductions.

The reductions were not opposed by any railroads, forwarders, shippers or consignees, and no motor carriers appeared either in the Commission or the District Court. Three non-profit membership corporations, two of which are the appellants, protested the reductions. Members of those corporations are motor carriers, including some who compete with WFA.

The Commission, in the Report by Division 3, unanimously approved the reduced rates and found they were "just and reasonable." (J. S. Appendix, pp. 10a-15a). In the Report on Reconsideration, the Commission affirmed the findings of Division 3 and found that the reduced rates were "not otherwise unlawful." (J. S. Appendix, p. 23a) Seven of the nine participating Commissioners joined in

the decision.* The District Court unanimously held that:

> "The order of the Commission should not be disturbed, and the complaint is therefore dismissed." (J. S. Appendix, p. 10a).

Even as reduced, the freight charges are more than fully compensatory to WFA. The cancellation of the reduction tariffs, sought by appellants for the benefit of their members who compete with WFA, would restrict WFA's ability to compete for shipments. The Commission stated:

> "It thus appears that the rates as proposed would yield substantially more than full cost plus a reasonable profit. On this record, we can not find that the suspended schedules constitute a destructive competitive practice." (J. S. Appendix, p. 15a)**

The Commission also reviewed WFA's operations which had been questioned by appellants and concluded that "there is no merit in the protestant's argument." (J. S. Appendix, p. 23a)

The District Court stated two independent grounds for dismissal of appellants' suit. One was the plaintiffs' lack of standing to sue and the other (discussed at greater length in the opinion) was the lack of merit in the attack on the Commission's order. We understand that the Gov-

* One dissented solely for reasons stated in his previous dissent in *Forwarder Volume Commodity Rates Between Chicago and New York*, 310 I.C.C. 199 (J. S. Appendix, p. 24a). The Commission's decision in that case, however, was subsequently approved by this Court. *Eastern Express, Inc. v. United States*, 369 U.S. 37 (1962). Appellants quote and rely on the dissenting opinion in that earlier case (J. S. 27-28), without referring to this Court's decision.

** Congress has admonished the Commission to give due consideration "to the need, in the public interest, of adequate and efficient freight-forwarder service at the lowest cost consistent with the furnishing of such service; * * *" (Section 406(d); 49 U.S.C. Sec. 1006(d)).

ernment and the Commission will discuss the former in their Motion to Affirm; we will therefore direct our discussion to the lack of merit in the complaint.

The reduced rates are on three levels, varying in amount depending upon the point at which the particular consignee desires to accept delivery of his shipment. A table showing these three levels of reductions is in the Report of the Commission (J. S. Appendix, p. 12a). One level (Note C in the table) applies when the consignee asks WFA to bring the goods to the consignee's store door. The second level of charges (Note B) applies to a consignee who does not want his shipment brought by WFA to a store door but, instead, wants to pick it up at WFA's terminal dock after it has been unloaded from the rail car. The goods, of course, are his to do with as he wishes after he accepts delivery at the dock.

It is reasonable and lawful in the views of WFA, the Commission and the District Court that the man who wants to take his shipment at WFA's terminal dock need not be required to pay WFA as much as the man who calls upon WFA to bring a shipment through the streets for a store-door delivery. The appellants disagree. They claim that Section 402(a)(5) of the Act* should have been construed to require WFA to publish only one rate, providing for store-door delivery, so that the consignee who takes delivery at WFA's dock (or the shipper of such a shipment) must pay as much as if the forwarder loaded the shipment into a truck and hauled it to a consignee's store door. They make the same argument regarding the reduction in Note A of the table (J. S. Appendix, p. 12a), which sets out a third level of reductions, to apply when the consignee wants to accept delivery from the forwarder

* That section (49 U.S.C. Sec. 1002(a)(5)) is quoted at J. S. pp. 3-4 and in the District Court's opinion, J. S. Appendix pp. 4a-5a.

while the shipment is still in the rail car and take it out and away by himself. He, too, they say, should be made to pay as much as the man who calls upon WFA to transport his shipment to his store door.

Implicit in part of appellants' argument is a contention that WFA, to retain its status as a freight forwarder under Part IV of the Act, must deny delivery of a shipment to a consignee who wants to take possession of his goods at the dock or in the car, and that WFA must insist on retaining the shipments until they have been delivered at the consignee's store door, although this is not entirely clear from appellants' contentions. Either by having to charge as much for shipments delivered in the car or on the dock as for shipments delivered at the store door, or by having to refuse the consignee access to the goods before they have been taken to a store door, WFA would be seriously hampered in providing and competing for the transcontinental transportation service on those shipments, to the benefit of appellants' motor carrier members. The shipping public also would suffer. As the District Court said:

> "Plaintiffs seek in effect to deny consignees access to freight forwarder service altogether in those instances when a consignor prefers to make delivery and a consignee considers it prudent or profitable to undertake such unloading and delivery operations himself. This might well be the case where particularly fragile or delicate goods are involved, or when the consignor or consignee considers himself otherwise better equipped to carry on those particular jobs." (J. S. Appendix, p. 8a)

The Commission and the District Court held that Congress has not enacted the prohibitive restrictions against the freight forwarders and the shipping public which are urged by the appellants. The decision clearly is correct. Moreover, there is nothing new in the principle that a for-

warder properly can turn the shipments over to the consignee without taking them to the consignee's store door and can publish appropriate rates for such service. In 1953, the Commission held that the operations of a forwarder whose tariff provided for delivery *only* at the forwarder's terminal were within the operations of a freight forwarder as defined in the section of the Interstate Commerce Act on which appellants here rely. The Commission in that case said:

> "A freight forwarder must publish rates and assume responsibility for shipments from point of receipt to ultimate destination, but there is nothing in this definition [Section 402(a)(5)] which requires it to perform, or to provide for the performance of a pickup and delivery service." *Barge Service Corp. Freight Forwarder Application*, 285 I.C.C. 249, 253, aff'd on reconsideration in 285 I.C.C. 309 (1953).

Section 402(a)(5) has no provision whatever that the break-bulk and distribution operations of a forwarder require delivery somewhere away from the forwarder's terminal dock or somewhere outside of the car in which the shipments were transported. Nor does the section require, as to every single shipment, that the forwarder must actually perform each of the functions that the forwarder is authorized to perform "in the ordinary and usual course of its undertaking." As the District Court properly held:

> "No reason appears to require a view that the break-bulk and distribution operations are always distinct, always occur in a certain order, and may never be consummated coincidentally or concurrently. We think it within the purview of statutory policy to consider that the freight forwarder has appropriately performed whatever his break-bulk and distribution functions may be when he has made a shipment available to a consignee at the destination terminal and, at consignee's option and request, relinquished control over the ship-

ment to the consignee to do with it as the latter sees fit under the contract." (J. S. Appendix, p. 9a)

Appellants also urge (J.S. pp. 25-6) that since railroads sometimes supply two or three small refrigerator cars to WFA (or to any other shipper) instead of the one boxcar ordered, and sometimes haul one of those small cars directly to the ultimate destination of the contents (rather than following the billed instructions to stop at WFA's assembly point and terminal point), the Commission should have rejected WFA's rate reduction tariffs on the theory that WFA is not a "freight forwarder" as defined in Section 402(a)(5) of the Act. Appellants' theory, held by the Commission and the District Court to be without merit, would eliminate WFA as a competitor of appellants' members where the railroads either decide or have the option of deciding that it would be more economical and efficient for them to handle some of WFA's shipments differently from the billing.

While "[t]he railroads, under their tariffs, reserve the right to transport a single carload shipment of merchandise in two or three refrigerator cars in lieu of one boxcar" (J.S. p. 25), the Commission noted that this right, when exercised, is "To facilitate the return of refrigerator cars to the west coast, and with pay loads * * *" (J.S. Appendix, p. 22a). WFA orders a boxcar for a consolidated carload shipment consisting of individual shipments of WFA's customers, either to load all of the carload shipment at its assembly point such as the one at Pittsburgh or to receive part of the load from a WFA customer at an outlying point and the rest by stopping at Pittsburgh (J.S. Appendix, p. 23a). If the handling is in the normal course in accordance with WFA's billing, "There is then no question that consolidation is practiced" (Commission, J.S. Appendix, p. 23a). If the railroad finds it desirable in its

operations to send refrigerator cars instead, it spots them at Pittsburgh when the entire load is there, or spots one at the outlying point and the other one or two at Pittsburgh.* In the split-load situation, when the refrigerator car or cars at Pittsburgh can handle the part of the load there, no useful purpose is served by stopping that car from the outlying point at Pittsburgh and the railroad therefore, for efficiency and economy, may decide to haul it west without stopping. At WFA's western terminal, such as Los Angeles, the various individual consignees of WFA, regardless of whether one boxcar or two or three refrigerator cars were supplied by the railroads, can get delivery from WFA of their individual shipments, pursuant to their desires as previously described above. If the carload shipment was billed to stop at Los Angeles for partial unloading, the rest to go on in the boxcar to a consignee at an outlying point, then if refrigerator cars are used by the railroads and if it happens that all of the goods in one of the refrigerator cars are destined to the outlying point, the railroad, if it wishes, can save itself unnecessary switching expense and can speed up the return of the empty car to it by taking that car to the outlying point without stopping at Los Angeles.

Appellants' argument that the Act forbids WFA from supplying freight forwarder service, and filing rates therefor, because the railroads have and sometimes exercise their reserved rights described above, is clearly erroneous. The Commission, after noting, in part, that the refrigerator car handling was not the normal handling, stated:

> "The fact that rules of the carriers performing the underlying transportation (which are not here in issue

* Under a railroad's "marriage" rules, it may also elect to supply two boxcars where only one car has been ordered. (J. S. Appendix, p. 23a).

but which are for their convenience) at times obviate the handling that otherwise would be performed, does not render the respondent's operations unlawful. We regard these operations as those of a freight forwarder as defined in the act. Thus, there is no merit in the protestant's argument." (J. S. Appendix, p. 23a)

The District Court, affirming, stated:

"The plaintiff Associations' objections to these operations cannot be upheld. With regard to instances where a consignor partially loads a boxcar himself and direct shipment thereafter prevents normal consolidation operations by the freight forwarder, who has no contact with the car whatever, we find nothing in the act which commands otherwise, nor do we observe that the national transportation [policy] is contravened by the practice. This practice, it is to be remembered, results from the operation of railroad and not freight forwarder rules, and moreover will be the exceptional and not the usual procedure." (J. S. Appendix, p. 7a)

Six years ago, in a rate case involving WFA itself, the Commission described WFA's operations of the kind involved here, including the use of refrigerator cars, movements of cars to western outlying points without actual stopoff, and loading by a shipper into a car furnished by WFA, and held that while certain changes should be made in the rates then in effect, the operations were freight forwarder operations under the Act. *Acme Fast Freight, Inc.* v. *Western Freight Association*, 299 I.C.C. 315, 322-3, 326-7 (1956). In 1943, only a year after enactment of Part IV, the use of multiple cars for freight forwarder shipments, to serve the convenience of the carrier, was approved, the Commission noting that "the usage of the business and sound railway or motor operating practice may require that all of the consolidated consignment be not necessarily forwarded in the same car or truck." *Consolidation of Shipments by Freight Forwarders*, 256 I.C.C.

306, 317 (1943). Indeed, the Commission's representative at the Congressional hearings preceding enactment of Part IV described what a freight forwarder actually did as including operations involving the railroad rule "that if the shipper orders a large car the railroad may, for its convenience, furnish two smaller cars instead," and operations where cars were billed by forwarders to stop for completion of loading at an intermediate point but were handled by the railroads direct to destination,* and the Commission itself, in presenting the draft of Section 402 (a)(5) in substantially its present form, stated expressly that the section "describes what a freight forwarder actually does."**

With respect to any carload consignment by WFA, the various individual shipments of WFA's customers together make up that consignment, including any part of a consignment that originates at an outlying point, and the rate charged by the railroad is the same either way the railroad elects to handle the consolidated carload consignment (J.S. Appendix, p. 7a fn.). Section 402(a)(5) does not say that assembly and consolidation, or break-bulk and distribution, must include placing the individual shipments in one car or coupling together the two or three cars that the railroads may supply to handle the consignment. As the Commission stated, the operations of WFA, including the ones where the railroad elects to exercise its operating option, are "those of a freight forwarder as defined in the act" (J.S. Appendix, p. 23a).

* Hearings before a Subcommittee of the Committee on Interstate Commerce, United States Senate, 76th Cong., 3rd Sess. on S. Res. 146 (1940), pages 27, 31, 32.

** Hearings before the Committee on Interstate and Foreign Commerce, H. of R., 77th Cong., 1st Sess. on H.R. 3684, a Bill to Amend the Interstate Commerce Act, as amended, to Provide for the Regulation of Freight Forwarders, p. 130.

None of the Commission or court cases cited by appellants involved the railroads' optional 2-or-3-for-1 car rule or the stops for partial loading or unloading and, as is reflected in the reports and opinion herein, none was inconsistent with the decision here. Moreover, as the District Court stated, denying appellants' assertion that the National Transportation Policy (J. S. p. 3) is opposed to these operations: "That aspect of the national transportation policy which seeks to promote more efficient service is clearly well served by the operations which may be undertaken under the freight forwarder rate schedule which the Commission has here approved." (J. S. Appendix, p. 9a).

For the reasons stated above, the unanimous decision of the District Court should be affirmed on the ground that the questions on which the decision depends are so unsubstantial as not to need further argument.

Respectfully submitted.

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November 1, 1962.